PERCETAKAN SOLAI SDN. BHD.

v.

KIN KWOK DAILY NEWS SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 1888 OF 1982]
19 DECEMBER 1984

CONTRACT: *Debt owing - Agreement to forbear to sue - Conditions - Payment of reduced sum - On specified date or one month after audit - Effect of alternative promises - Default - Original sum payable - What is reasonable time to conduct audit.*

CIVIL PROCEDURE: *Order 14 application - Fair case for defence - Reasonable grounds - Leave to defend - No reasonable grounds - Whether entitled to judgment.*

This is an appeal against the refusal of the Senior Assistant Registrar to enter final judgment against the defendants on an O. 14 application as prayed or at all. The plaintiff company being suppliers of printing material had supplied to the 1st defendants with such material from time to time. The plaintiffs' claim against the two defendant companies is for a sum of RM1,496,869.71 or alternatively RM1,475,000 for goods sold and delivered to the 1st defendant company, together with interest from the date of filing the writ and costs.

By a letter dated 26 June 1980, the plaintiffs sought confirmation of the 1st defendants that the balance outstanding was RM1,666,869.54 which confirmation was so provided. The plaintiffs however contended that as at the date of the amended statement of claim the balance outstanding was RM1,496,869.71. In spite of the admission of liability on 26 June 1980, on 28 November 1980 the plaintiffs entered into a written agreement with the defendant companies whereby the plaintiff company agreed to withhold legal proceedings if a reduced sum of 45% of the RM1,475,000 was paid, by (1) 24 monthly equal instalments commencing from 25 February 1981 or within one month after the audit of the accounts and (ii) 25% of the reduced sum of 45% to be by way of adjustment of accounts of the plaintiffs in respect of advertisements to be placed in the Kin Kwok Daily News over a period of two years commencing on 1 January 1981. The written agreement also provided that in default of one or any of the instalments for a period of thirty days after it becomes due the whole of the original debt of RM1,475,000 will become payable less any sums which have been paid or received.

The 1st defendant company failed to make payment of the instalments on 25 February 1981 and contended that as their accounts had not been audited there was no call to commence payment of the instalments.

Held:

[1] There was an implied term in the agreement of 28 November 1980 that the audit of the 1st defendant company's accounts and the approval thereof by the Board of Directors would and should be effected within a reasonable period of time and if not the instalments should commence within one month of the expiry of the reasonable period of time. The reasonable period of time should be no more than three months. Therefore, the instalment payments should have commenced either on 25 February 1981 or not later than three months after 25 February 1981.

[2] The plaintiffs were entitled to invoke the default clause and are entitled to final judgment on the alternative claim of RM1,475,000 together with interest thereon at 8% per annum.

[Appeal allowed with costs.]

Cases referred to:
McIlquham v. Taylor [1895] 1 Ch 53
Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Food [1963] 1 All ER 545
Sinason-Teicher Corpn. v. Oilcakes, etc. Co. [1954] 3 All ER 468
Hartwells of Oxford Ltd. v. British Motor Trade Assoc. [1950] 2 All ER 705
Saw v. Hakim 5 TLR 72
Sheppards v. Wilkinson 6 TLR 13
Jones v. Stone [1894] AC 122
Electric and General Corpn. v. Thomson-Houston Electric 10 TLR 103
Cow v. Casey [1949] 1 KB 481

Other source referred to:
Halsbury's 4th Edn., Vol. 9, para. 446 & 479

For the plaintiffs/appellants - Gurbakhash Singh; M/s. Gurbakhash & Tan
For the defendants/respondents - Liza Chan; M/s. Megat Najmuddin, Leong & Co.

JUDGMENT

VC George J:

This is an appeal against the refusal by the Senior Assistant Registrar to allow the plaintiffs to enter final judgment against the defendants on an O. 14 application as prayed or at all.

The affidavits filed in support of the application and opposing it reveal that the plaintiff company are suppliers of printing material and that they had been from time to time selling such printing material including newsprint to the 1st defendant company. It would appear that at one stage in the relations between the two companies, one Sham Kong Shing alias Sum Kok Seng was a director in each of the two companies and it would seem that through his influence not only were goods sold by the plaintiffs to the 1st defendants on virtually unlimited credit terms but from time to time substantial sums of moneys were lent by the plaintiffs to the 1st defendants. As to the goods sold to the 1st defendants by the plaintiffs, delivery was made to the 1st defendants either by the plaintiffs or by the plaintiff's foreign suppliers on the instructions of the plaintiffs.

By a letter dated 26 June 1980 the plaintiffs sought the confirmation of the 1st defendants that the balance outstanding due from the 1st defendants to the plaintiffs was RM1,666,869.54. By that letter the plaintiffs informed the 1st defendants that the confirmation sought was needed in respect of the audit of the plaintiffs' accounts and required the 1st defendants to supply details of discrepancies if the confirmation sought was not forthcoming. The confirmation was provided by the 1st defendants on 26 June 1980.

The plaintiffs contend that as on the date of the amended statement of claim the balance outstanding was RM1,496,869.71 and by the O. 14 application they asked (as the first of their two alternate claims) for judgment in that amount, interest from date of filing the writ and costs as against the 1st defendants.

Now, prior to the O. 14 application coming on for hearing before the Senior Assistant Registrar the plaintiffs had managed to get answers to certain interrogatories by which the defendants admitted to having bought goods from the plaintiffs at the cost of RM1,920,526.72. The defendants also admitted by the answers to the interrogatories to having borrowed from the

plaintiffs RM1,737,446. The total of these two amounts is RM3,657,972.72. The defendants also stated in the Answers that up to 1982 they had paid to the plaintiffs RM2,933,036.94. That amount deducted from the RM3,657,972.72 gives a balance of RM724,935.78.

Miss Liza Chan of counsel for the defendants pointed out that in settling the Answers there was an inadvertent duplication of one of the invoices No: 1086, and that because of that an amount of RM184,246.62 should be debited to the RM3,657,972.72. Mr. Gurbakhash Singh conceded that there was such a duplication. The difference between that reduced amount and the amounts paid is RM540,689.16. It was contended for the plaintiffs that even taking into account the said duplication there was an unqualified admission by the 1st defendants that they owed the plaintiffs RM540,689.16.

But for the fact of the parties having entered into the agreement that they had entered into on 28 November 1980 (which agreement is more particularly examined further down in this judgment), at this stage in the action the plaintiffs would have been entitled on this aspect of their claim to summary judgment in the sum of RM540,689.16 (as being an admitted amount) together with interest thereon at 8% per annum from the date of the writ and the defendants would have been entitled to unconditional leave to defend in respect of the rest of the plaintiffs' claim.

What had happened was that in spite of that unqualified admission by the 1st defendants, on 26 June 1980, of the amount owing, it would seem that in November 1980 the plaintiff company was prepared to allow the 1st defendants to have their accounts audited before ascertaining what was acceptable by the 1st defendants as owing to the plaintiffs. Tee An Chuan, the Managing Director of the 1st defendant company, in his affidavit affirmed on 4 April 1983 stated at para. 11:

> However sometime in November 1980 after discussions the defendant Company was prepared to compromise this matter and entered into an agreement with the plaintiff Company on or about 28 November 1980, a copy of which agreement is now shown and produced to me and marked 'TAC-1' herein.

With the parties entering into the written agreement whatever rights the plaintiffs had against the 1st defendants prior thereto were superseded by the terms and conditions of the agreement. The plaintiffs indeed seem to appreciate that that could be the position as their alternate claim is on the said agreement. They say that on that agreement they are entitled to judgment against the defendants in the sum of RM1,475,000.

Portions of the agreement starting with the two preambles need to be read:

> **WHEREAS** the said Creditor has sold and delivered goods to the said Company in the sum of Ringgit **ONE MILLION FOUR HUNDRED** and **SEVENTY FIVE THOUSAND** (RM1,475,00). The aforesaid sum shall be subjected to the audit of accounts of the said Company and approved by the Board of Directors of the said Company (hereinafter called 'the said debt').
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> **AND WHEREAS** at the request of the said Company and the said Guarantor, the said Creditor has agreed to withhold legal proceedings against the said Company and to permit the said Company to pay the reduced sum of 45% of the said debt (hereinafter called 'the Reduced Sum') in the manner hereinafter provided and the said Guarantor have agreed to guarantee the due repayment of the 45% of the said Debt by the said Company on the terms hereinafter contained.

NOW IT IS HEREBY AGREED as follows:

(1) In consideration of the said Creditor having at the request of the said Company and the said Guarantor to withhold legal proceedings against the said Company to permit the said Company to pay the 45% of the said debt in the manner hereinafter set out, the said Guarantor guarantees the due payment of the said sum of 45% of the said debt by the said Company.

(2) The said Company shall repay the said sum of 45% of the said debt in the following manner:

(a) the said sum of 45% of the debt by twenty four (24) monthly equal instalments commencing from 25 February 1981 or within one month after the audit of the accounts of the said Company and approved by the Board of Directors of the said Company:

(b) a sum of 25% of the said reduced sum by adjustment of accounts of the said Creditor with the said Company in respect of advertisements to be placed in **Kin Kwok Daily News** over the next two (2) years commencing on 1 January 1981.

(3) If the said Company shall have defaulted in the payment of one or any instalment for a period of thirty (30) days after the same shall have become due, then the whole of the original debt less such sums as shall have paid or received hereunder.

(4) The said Guarantor covenants with the said Creditor that if the said Company shall in any respect fail to carry out the provision in Clause 2 and 3 above, they shall make good any default by the said company within seven (7) days upon being notified thereof in the payment of the sums due thereunder.

(5) This guarantee granted herein shall be continuing guarantee and shall only be discharged upon the full settlement of the sums due hereunder.

In Witness Whereof ...

The 1st defendant company failed to make payment of any instalments. They contend that Clause 2(a) provided two options in respect of the commencement of the payment of the instalments i.e., either from 25 February 1981 or within one month after the audit of the accounts of the 1st defendants and approval thereof by the Board of Directors and that they were entitled to and relied on the second option and that as the accounts had not been audited there was no call to commence the payments of the instalments. Their Managing Director Tee An Chuan in para. 15 of his affidavit of 4 April 1983, explained that, "As the latter condition had not been carried out any sum due to the plaintiff Company (if at all) is not due and payable until after the said audit and approval by the Board of Directors." According to para. 8 of the statement of defence the 1st defendants had by letter of 30 July 1982 "indicated" that the alternative modus of payment (i.e. commencement of the payment of instalments within 30 days of the audit of accounts and approval thereof by the Board of Directors) "was not viable as their accounts would take some time to audit and this would protract and delay repayment of the said sum to the plaintiffs."

Mr. Gurbakhash Singh of counsel for the plaintiffs submitted that if a promise is made in the alternative form and one alternative is impossible to perform, the promisor must as a general rule perform the other. Para. 446 of *Halsbury's* 4 Edn., Vol. 9 (on contracts) reads:

446. Alternative promises. When a promise is made in an alternative form and one alternative is impossible to perform, the question whether the promisor is bound to perform the other or is altogether excused depends on the intention of the parties to be ascertained from the nature and terms of the contract and the circumstances of the particular case.

> The usual result in such a case will be that the promisor must perform the alternative which remains possible; but it may be that on the proper construction of the contract there is not one obligation to be performed in alternative ways but one obligation to be performed in one way unless the promisor chooses to substitute another way, in which case, the primary obligation being impeded, the promisor is not bound to exercise the option for the benefit of the other party.

In *McIlquham v. Taylor* [1895] 1 Ch 53 the defendant had covenanted by deed within 12 months to pay the sum of £1,000 or transfer to the plaintiff £1,000 worth of fully paid shares in a company to be formed by the defendant. The defendant formed the company but in such a way that he was not able to transfer £1,000 worth of fully paid shares in it to the plaintiff. Stirling J. in the Chancery Division held that the defendant not being in a position to comply with that part of the covenant to transfer the shares was bound to perform the alternative and pay the £1,000 which judgment was affirmed by the Court of Appeal.

In the instant case however that principle had really no application because when 25 February 1981 had passed by and the 1st defendants had not commenced payment of the first instalment it amounted to the exercise of the option by the 1st defendants to commence payment of the instalments from the alternative period provided by Clause 2(a) of the agreement. In effect the 1st defendant were left with no option but to commence payments one month after the audit of their accounts and approval thereof by their Board of Directors. Since 25 February 1981 had come and gone the 1st defendants could not fall back on commencement of payment of instalments from that date. See *Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Food* [1963] 1 All ER 545 at 561E.

Now, "Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case." (*Halsbury's* 4th Edn., Vol. 9 para. 479). There was an implied term in that agreement of 28 November 1980 that the audit of the 1st defendants' accounts and the approval thereof by the Board of Directors would and should be effected within a reasonable period and if not, in my judgement, the 1st defendants had to commence payment of the instalments within one month of the expiry of that reasonable period. Reasonable time has to be computed in all the relevant circumstances that obtain. (See for instance *Sinason-Teicher Corpn. v. Oilcakes, etc. Co.* [1954] 3 All ER 468 in respect of the provision of a bank guarantee and *Hartwells of Oxford Ltd. v. British Motor Trade Assoc.* [1950] 2 All ER 705 in respect of delivery of a motor car).

In the instant case the agreement of 28 November 1980 provided that the first of the 24 monthly instalments was to be paid either on 25 February 1981 "or within one month after the audit ...".

That one of the two modes of instalment payment called for the commencement of such payments from 25 February 1981 compellingly suggests that the commencement of the alternative instalments payment programme should be at about the same time or soon after. In the context it seems to me that for it to be reasonable, at most there could have been an allowable delay of 2 or 3 months from 25 February 1981 for completing the audit and for obtaining the approval thereof by the Board before the commencement of the payment of the instalments. Anything more than that would be unreasonable.

It is also seen (from Clause 2(a) and (b)) that the scheme of the agreement was that within two years or thereabouts, 45% of RM1,475,000 would be paid to the plaintiffs, 75% thereof in cash and 25% thereof by advertisements in the 1st defendants' newspaper. In October 1982, when some 19 months (from 25 February 1981) had passed without any commencement

of payment of instalments, it seems to me that in any event the plaintiffs were entitled to take the attitude that more than sufficient time had passed. They caused the writ to issue on 2 October 1982 and say that they are entitled to summary judgment under O. 14 for the full amount of RM1,475,000 interest and costs pursuant to Clause 3 of the agreement.

My attention has also been drawn to the fact that in any event there is an admission that the accounts of the 1st defendants had in fact been audited. What had happened was that the 1st defendant company had by their letter of 6 August 1982 requested the plaintiffs to confirm that the balance due to the plaintiffs was RM1,415,314.60. The plaintiffs provided the confirmation in writing. A few days later on 11 August 1982 the defendant company wrote again to the plaintiffs stating that that amount was not final. Tee An Chuan the Managing Director of the 1st defendant company explained what had happened and why, in para. 21, 22 and 23 of his affidavit of 2 August 1983 (enclosure 18) viz:

> 21. With respect to para. 15 of the Second Affidavit the exhibit therein namely Exhibit P466 was issued by the defendants Company's internal audit department and was part of the general procedure whereby there were sent to all Creditors/debtors extracted from the entries in books of the defendant Company but without verification or substantiation at that time of the original documents supporting such entries. This was done as amongst the preliminary steps in attempting to finalise the audit mentioned pursuant to para. 22 herein.
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> 22. However, on the actual audit involving the original documents in support of the book entries there were material and irreconcilable discrepancies some of which have been highlighted in by para. 12, 13, 14, 15 and 16 above.
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> 23. Upon ascertaining this the defendant Company promptly by letter dated 11 August 1982 to the plaintiff Company informed it that the sum was not final and requested for the plaintiff Company's statement of account.

I agree with Mr. Gurbakhash Singh that this amounts to an admission that by 11 August 1982 there had been an "actual audit".

Now, on a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence he ought to be given leave to defend (*Saw v. Hakim* 5 TLR 72). A defendant should not be shut out from defending unless it is very clear indeed that he has no case in the action under discussion (*Sheppards v. Wilkinson* 6 TLR 13). The power to give summary judgment under O. 14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". *(Jones v. Stone* [1894] AC 122). Where there is any serious conflict to matters of fact or where any real difficulty as to matters of law arises, summary judgment under O. 14 should not be granted. (*Electric and General Corpn. v. Thomson-Houston Electric* 10 TLR 103). But, however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable it will give final judgment (*Cow v. Casey* [1949] 1 KB 481).

In the instant case the claim based on the agreement of 28 November 1980 turns on the true construction of the provisions of the agreement which boils down to the question whether the defendants can be allowed to rely on their contention that their accounts had not been audited. All the necessary evidence necessary to adjudge the issue was before the Court and law to be applied is really trite. That within a reasonable period of 25 February 1981 the defendants should have commenced payment of the instalments is unarguable. In my judgment the accounts should have been audited and approved within a reasonable period after

25 February 1981 which I hold to be not later than 3 months from that date which would take the matter to 24 May 1981 and the first of the instalments should have been paid one month thereafter i.e., not later than 24 June 1981. Even if I am wrong on this there was no excuse whatsoever for the 1st defendants to have not commenced the payments one month after 11 August 1982 by which date I have found as a fact that the "actual" audit had been made.

The plaintiffs were entitled to invoke Clause 3 of the agreement as they have done by their alternative claim and are entitled to final judgment in the sum of RM1,475,000 together with interest thereon at 8% per annum as prayed.

The appeal is allowed with costs. There will be final judgment for the plaintiffs as against the 1st defendants in the sum of RM1,475,000 together with interest thereon at 8% per annum from the date of the writ.

Also found at [1985] 1 CLJ 189